IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

PAULA RAINEY PLAINTIFF

V. CIVIL ACTION NO. 2:00CV00222B-B

ROYAL VENDORS, INC. DEFENDANT

MEMORANDUM OPINION

This cause comes before the court on the motion for summary judgment filed by the defendant, Royal Vendors, Inc. [Royal Vendors]. Upon due consideration of the parties' pleadings, memoranda and exhibits, the court is ready to rule.

FACTS

The plaintiff's cause arises from her employment with Royal Vendors in its Cleveland, Mississippi facility as the site's environmental health and safety coordinator. The relevant facts are widely in dispute. The court recounts the following facts making every reasonable inference in favor of the plaintiff, while highlighting the material factual disputes.

The plaintiff alleges that from very early on in her employment, Charles Gorman, her immediate supervisor, and Mike Easley, plant manager of the entire facility, did not want her to interact with male employees and repeatedly attempted to limit her dealings with them. Specifically, when the plant was still under construction, Gorman interrogated the plaintiff whenever she went to the construction site about whether anyone had accompanied her and the identities of the individuals she was seeking. After the plant was built, Gorman routinely followed the plaintiff when she was on the plant floor, questioning any male employee with whom she had spoken about the nature of their conversation. According to the plaintiff, this particular practice became so severe that the other staff members began avoiding her in order to evade Gorman's questioning. Gorman also allegedly prohibited the plaintiff from riding to lunch in the same car with men and questioned her when she returned from these events about what had

transpired. On one occasion, the plaintiff was chastised for sitting at a table with men and, on a separate occasion, admonished about being seen in public with men. Additionally, the plaintiff was questioned about her love life and her ongoing divorce. Throughout her employment, Gorman and Easley cited their concern for "company image" to explain their behavior.[1] The plaintiff contends that male employees were not given similar treatment.

The plaintiff also alleges that during her employment she was approached by female employees in the paint department who complained of sexual harassment by Amos Rogers, their supervisor. According to the plaintiff, on January 14, 2000, one of the employees, Sonya Cooper, approached and confided in the plaintiff after an incident in which Rogers sexually propositioned her. Cooper told the plaintiff that she responded to Rogers's offensive behavior by cursing at him and was thereafter given a written reprimand in a meeting with three male management employees for foul language, while her sexual harassment complaint against Rogers was ignored. After the incident involving Cooper, another female employee, Land Rutledge, informed the plaintiff that Rogers was "starting to talk that stuff" and "messing" with her, although Rutledge stated that it did not bother her. The plaintiff on separate occasions relayed to Gorman what Cooper and Rutledge had conveyed to her. In response to her report on behalf of Cooper, Gorman referred the plaintiff to Easley, who instructed her to "keep quiet" about the charges and not to say anything further if Cooper approached her again about the issue. The plaintiff did not pursue the matter in connection with Rutledge after being informed by Rutledge that the situation was "better now," but continued to inquire of management about the progress of the investigation into Cooper's charges because of her belief that nothing was being done. According to the plaintiff, the Human Resources Department of the Cleveland facility did not take any action to

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[1] The defendant engages in a lengthy dispute over the severity and frequency of Gorman and Easley's conduct in connection with their alleged monitoring of the plaintiff in her dealings with men. However, the defendant's version of the facts is not recounted because it is not material to the court's ruling and discussion hereinafter on the plaintiff's claim related to this matter. *See infra* p. 7-10.

investigate Cooper's harassment claim until a week or two after Cooper informed management of Rogers's conduct and the defendant's corporate headquarters got involved in the matter. The plaintiff alleges that after her attempts to follow up on the progress of the investigation, she began to be critiqued more and monitored more carefully, so much so that the harsher treatment was noticed by other employees.

The defendant disputes the plaintiff's version of the facts with respect to her reporting of the sexual harassment charges on behalf of the female employees. According to the defendant, Cooper was written up by Eddie Perry, one of her supervisors, for failing to wear a bump cap and using inappropriate language. At that time, Cooper informed Perry, for the first time, that Rogers made a sexually offensive comment to her. Cooper was told by Perry that management would investigate her allegation. Thereafter, Cooper spoke with the plaintiff about the sexual harassment. The plaintiff made a note of this conversation and reported Cooper's sexual harassment charge to Gorman and Easley. Easley responded to the plaintiff by advising her that the company takes all allegations of sexual harassment seriously and that the allegation by Cooper would be investigated. On Monday, January 17, 2000, three days after Cooper initially made the harassment charge to Perry, the company began an investigation, interviewing all eight employees in the paint department. On January 18, 2000, the investigation was completed and, at that time, Perry, Easley, Debbie Christmas, Manager of Human Resources, and Hayes Lee, Manager of Manufacturing, informed Cooper that none of the employees in the paint department reported that they had witnessed Rogers do or say anything offensive or inappropriate to Cooper. The defendant also notes that after January 14, 2000, Rogers never said or did anything in Cooper's presence which she considered to be inappropriate. In early March of 2000, Cooper told Christmas, "Everything is fine now, and Amos doesn't bother me anymore." Also in March, 2000, various members of the paint department again stated that they had not witnessed any inappropriate or offensive behavior on the part of Rogers.

On February 28, 2000, an employee in the paint department under Amos Rogers's supervision was injured by a defective paint gun. As the site's safety coordinator, the plaintiff investigated the

incident and determined that Rogers had ignored the employee's call to turn off the paint line, causing the employee to hyperventilate from sprawling paint. Shortly thereafter, according to the plaintiff, Gorman advised her that Easley wanted the report discarded and rewritten according to Easley's instructions. In particular, Gorman advised her to draft a new report deleting the portions of the original report which indicated that the paint gun was not working properly, that the injured employee actually inhaled paint fumes and that Rogers ignored the employee's request for assistance. The plaintiff refused to amend or destroy her original report. The defendant denies that Gorman or Easley asked the plaintiff to destroy the original report. Instead, according to the defendant, Easley merely wanted to add "the employee said" in front of the parts of the report documenting the defective paint gun, the employee's inhalation of paint and Rogers's failure to assist the employee, in order to indicate that these were unsubstantiated facts.

It is undisputed that the plaintiff was discharged on March 17, 2000, along with Hayes Lee, a male supervisor, although Lee's discharge did not become effective until approximately a month later. In a meeting with Easley, Gorman and Christmas, the plaintiff was advised that her employment was being terminated due to "economic cutbacks." When the plaintiff asked how she was selected for the lay off, Easley stated that he was dissatisfied with her performance. The plaintiff responded by expressing her opinion that she was being discharged because of her refusal to change the safety reports. The plaintiff was, immediately thereafter, ordered by Easley to pack up her belongings and leave the plant within three minutes.

II. LAW / DISCUSSION

A. Summary Judgment Standard

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by . . . affidavits, or by

the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp.*, 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

B. Title VII Claims

1. Disparate Treatment

In order to prevail on a Title VII claim disparate treatment claim, the plaintiff may use the evidentiary framework originally introduced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d. 668 (1973) and more recently reaffirmed in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). To establish a *prima facie* case of disparate treatment under Title VII, the plaintiff must demonstrate that: (1) she is a member of a protected class; (2) she is qualified for the position; (3) she suffered an adverse employment decision; and (4) others similarly situated were more favorably treated. *Rutherford v. Harris County Tex.*, 197 F.3d 173, 184 (5th Cir. 1999)(citing *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998)). The *prima facie* case, once established, raises a presumption of discrimination, which the defendant must rebut by articulating a legitimate, nondiscriminatory reason for its action. *See Meinecke v. H & R Block*, 66 F.3d 77, 83 (5th Cir. 1995)(citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 67 L.Ed.2d 207, 216 (1981)). If the defendant satisfies this burden, the plaintiff must prove that the proffered reasons are pretextual. Ultimately, the burden of persuasion rests on the plaintiff, who must establish the statutory violation by a preponderance of the evidence. *Id.*

(citing *Jespen v. Florida Bd. Of Regents*, 610 F.2d 1379, 1382 (5th Cir. 1980). Even if the plaintiff succeeds in revealing the defendants' reasons for the adverse employment decision as false, she still bears the ultimate responsibility of proving that the real reason was unlawful "intentional discrimination." *See St. Mary's*, 509 U.S. at 519 ("It is not enough to *dis*believe the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination").

It is undisputed that the plaintiff satisfies the first two elements of the *prima facie* case of disparate treatment. With respect to the third element, i.e., whether she suffered an "adverse employment action," the plaintiff observes that the definition of an "adverse employment action" in a disparate treatment claim reaches conduct that merely "tends to" result in a change of employment status, benefits or responsibilities. *See Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 407 (5th Cir. 1999). The plaintiff contends that during her employment she was exposed to treatment that meets the lighter "tend to adversely affect" standard for "adverse employment action" and sets forth as factual support the following series of conduct by the Cleveland facility's male management employees: monitoring the plaintiff to such an extent that she was "shunned," thus limiting her ability to do her job; instructing the plaintiff that she could no longer approve requests for leave to visit a doctor for a work-related injury without Gorman or Easley's consent; preventing the plaintiff from socializing with male co-workers; questioning the plaintiff about her social life; a supervisor telling the plaintiff that he did not want to hear "any more of [her] shit." While the plaintiff correctly construes the standard for "adverse employment action" in a disparate treatment context, the court rejects her argument that the alleged conduct fits within the range of activities contemplated by that standard. The plaintiff's allegation that her ability to function in her duties was hindered by the male managers is contradicted by her insistence elsewhere in her brief that she performed her tasks well, a point she raises in response to the defendant's citation of unsatisfactory performance as one of the grounds for her discharge. In any event, even if all of the said actions are *arguendo* taken to be true, they do not rise to the level of conduct on the part of the employer that supports a Title VII disparate treatment claim, even under the lighter "tend to adversely affect" standard. *See id*. This conclusion is not altered by the

plaintiff's argument that all of the above-mentioned actions should be taken into consideration collectively rather than as isolated incidents.

The plaintiff, also, intimates other theories of disparate treatment without actually formulating them as specific arguments in support of her cause. In the "facts" section of the pretrial order and her brief, the plaintiff asserts that Hayes Lee, the other male employee who was discharged, was allowed to work an additional month after her last date of employment and apparently offers this fact as evidence of intentional discrimination on the part of the defendant.[2] The court is not convinced that this fact alone establishes a *prima facie* case of disparate treatment. In any event, the defendant explains that Hayes Lee's employment needed to be retained for an additional month in order to complete an ongoing ISO 9000 certification, whereas the plaintiff's duties as environmental safety and health coordinator could more readily be delegated to other supervisors. The plaintiff does not offer a response to the defendant's legitimate, non-discriminatory reason for allowing Hayes Lee to work an additional month or otherwise show that the defendant's explanation is pretextual. Accordingly, the plaintiff's attempt to base her disparate treatment claim on the fact that she was deprived of the additional month of employment afforded to Hayes Lee is not well-taken.

Additionally, in the pretrial order the plaintiff contends for the first time that her employment was terminated because of her gender. Nowhere in the plaintiff's brief does she allege her discharge as a factual basis of her disparate treatment claim. The only portion of the plaintiff's brief which can

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[2] Specifically, the fact that Hayes Lee, a male employee, was allowed to work an additional month is mentioned in the "facts" section of the plaintiff's brief, but is not offered as a basis of her disparate treatment claim in the "arguments" section. Instead, at the end of the "arguments" section discussing disparate treatment, the plaintiff merely states that "[t]he facts outlined in ths brief demonstrate that there is a genuine issue of material fact as to whether or not Paula Rainey was being treated differently, and unfavorably, because she was a woman." The pretrial order states: "[The defendant's] discrimination was furthered following her termination, since it refused to treat Rainey in the same fashion as males previously 'laid off.' Specifically, Hayes Lee was laid off, but allowed to work thirty additional days while looking for other employment. Plaintiff was not given this opportunity."

conceivably be construed as such an argument is Easley's criticism of her as overly "independent" and "direct" and her interpretation that "[these are] obviously male trait[s], inappropriate for a woman." Easley's comments do not alone establish that the decision to discharge her employment was prompted by a discriminatory motive. Therefore, even if the plaintiff intended to argue that her discharge was motivated by gender discrimination, the court finds that such an allegation is too speculative to withstand the defendant's motion for summary judgment.

The plaintiff presents no other arguments in furtherance of her Title VII disparate treatment claim. Accordingly, upon a careful consideration of the facts presented and a thorough review of the evidence in the record, the court finds that the plaintiff's Title VII disparate treatment claim should be dismissed.

2. Retaliation

A plaintiff may bring a claim of Title VII retaliation if the employer discriminates against her because she has opposed any unlawful practice under Title VII. 42 U.S.C. § 2000e-3(a). In order to establish a *prima facie* case of retaliation, a plaintiff must demonstrate: (1) that she engaged in an activity protected by Title VII; (2) that she suffered an adverse employment action; (3) that there was a causal connection between the participation in the protected activity and the adverse employment decision. *Shackelford*, 190 F.3d at 407-408 (citing *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 41 (5th Cir. 1992)). Only "ultimate employment decisions," such as "hiring, granting leave, discharging, promoting, and compensating" satisfy the "adverse employment action" element of the *prima facie* case of retaliation. *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995). Since the plaintiff in the instant cause relies solely on circumstantial evidence in her attempt to establish a *prima facie* case of retaliation, the tripartite burden-shifting framework of *McDonnell-Douglas* applies. *See Portis v. First Nat'l Bank*, 34 F.3d 325, 328 (5th Cir. 1994). Accordingly, the plaintiff carries the initial burden of establishing a *prima facie* case of retaliation. *See McDonnell Douglas Corp.*, 411 U.S. at 802. At this threshold stage, the standard for satisfying the causation element of the *prima facie* case is "much less stringent" than a "but for" causation standard. *Fierros v. Texas Dept. of Health*, 274 F.3d 187

(5th Cir. 2001). A *prima facie* showing raises an inference of retaliatory motive that the employer can rebut by producing evidence of a legitimate, non-retaliatory reason for the adverse action. *Evans v. City of Houston*, 246 F.3d 344, 354 (5th Cir. 2001). If the employer produces such evidence, then the plaintiff has the burden of proving that the Title VII protected activity was a "but for" cause of the adverse employment decision. *Fierros*, 274 F.3d at 191.

The plaintiff rests her retaliation claim entirely on the theory that she was discharged for her reporting of sexual harassment on behalf two female employees, Sonya Cooper and Land Rutledge, allegedly perpetrated by their supervisor, Amos Rogers. Essentially, the plaintiff's theory of retaliation in connection with her reporting of Cooper and Rutledge's alleged harassment is twofold. First, the plaintiff contends that the male supervisors participated in a cover-up. Second, the plaintiff contends that she was discharged because her persistence to make sure that the harassment claims were being promptly and properly investigated posed a threat to the cover-up. The plaintiff's particular method of proving her theory focuses exclusively on the former allegation, that a cover-up was conducted, in an effort to establish circumstantial evidence of the latter, that she was discharged for her persistence. Specifically, the plaintiff attempts to reveal the defendant's alleged review of Cooper's allegation as a sham investigation by highlighting several factual inconsistencies. The plaintiff emphasizes that she was never contacted about her conversation with Cooper, that she repeatedly had to inquire into whether Cooper's claims were being investigated, and that Cooper felt the need to confide in her in the first place as events indicating that an investigation never took place. Also, the plaintiff attempts to refute the defendant's specific argument that Easley already knew about Cooper's harassment claim and thus could not have discharged the plaintiff for attempting to report information he already knew by pointing out that both Easley and Gorman "acted like [they] had never heard of it before" and also that Cooper "got scared" when the plaintiff expressed her intent to report Cooper's allegation to management . Furthermore, as aforementioned in the court's summary of the facts herein, the plaintiff alleges that the Human Resources Department did not become involved in the investigation of Cooper's claim until two weeks after Cooper's initially made the charge and only because the defendant's corporate

headquarters intervened. After carefully considering the plaintiff's arguments and the evidence in the record pertaining thereto, the court finds that the retaliation claim is not well-taken.

A considerable part of the plaintiff's proffered facts with respect to Cooper's alleged harassment, the crux of the retaliation claim, is at odds with the record evidence. In particular, the plaintiff's allegation that Cooper came to the plaintiff voluntarily to discuss the incident is directly contradicted by Cooper's own affidavit, which states that it was the plaintiff who first approached her. The plaintiff's reliance on the sheer number of her inquiries as evidence of the management's indifference to Cooper's claim is misplaced in light of the plaintiff's own admission in her deposition testimony that Gorman had told her that the matter "was taken care of." In any case, Easley testified that he was never aware of the plaintiff's attempts, after their first and only meeting regarding Cooper, to follow up on the matter, and the plaintiff fails to establish any evidence which shows otherwise. With respect to the plaintiff's argument that she would have been consulted about what Cooper had told her if an actual investigation took place, the court finds that whether the plaintiff was contacted about her conversation with Cooper is immaterial to the issue of whether an investigation of the harassment claim was actually conducted. Moreover, the plaintiff's impression of Cooper's fear at the prospect of reporting the alleged harassment to management and Gorman and Easley's apparent lack of familiarity with the incident at the time of the plaintiff's initial report is too speculative to support her theory of a cover-up. The same holds true with regard to the plaintiff's allegation that the Human Resources Department did not participate in the investigation until one week after Cooper initially informed management of the harassment and only after corporate headquarters became involved. The plaintiff does not present any evidence in support of this allegation and admits in her deposition that she was not engaged with the investigation after her initial report to Gorman and Easley. In any event, the plaintiff's allegation, even if assumed *arguendo* to be true, does not establish an inadequate investigation or a cover-up, on which the plaintiff bases entirely her retaliation claim.

Likewise, the plaintiff's allegation in connection with Land Rutledge does not establish a *prima facie* case of retaliation. As aforementioned, Land Rutledge told the plaintiff that Rogers was "starting

to mess" and "to talk that stuff with her, but that this behavior did not bother her. The plaintiff admits in her deposition that she communicated this information to Gorman on a single occasion and made no further inquiries. It is undisputed that she did not make such a report to Easley, who was the sole decision maker with respect to her discharge. The mere fact that the plaintiff reported Rutledge's claim to Gorman is too speculative to establish the requisite causal connection of the *prima facie* case of retaliation. The plaintiff insists that the facts in connection with her reporting of Cooper and Rutledge's claim should be considered collectively in view of the totality of the circumstances involved. The court finds that such collective evidence is insufficient to establish a *prima facie* case of retaliation.

The court is mindful of the law in the Fifth Circuit which holds that close timing between an employee's protected activity and an adverse action may provide the "causal connection" required to make out a *prima facie* case. *Swanson v. Georgia Services Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997). It is undisputed that the plaintiff was discharged on March 17, 2000. The plaintiff argues that the time period between the protected activity and the adverse employment action is "a few weeks," as measured from her reporting of Rutledge's alleged harassment to the date of her discharge. The defendant contends that Easley was unaware of the plaintiff's report with regard to Rutledge and, therefore, that the date of the protected activity, for the purpose of determining the time period, is not when the plaintiff made the report on behalf of Rutledge. Instead, the defendant argues that timing of the protected activity should be set at January 18, 2000, the date on which the internal investigation of Cooper's claim was completed, which means that approximately two months transpired between the protected activity and the adverse employment action.

Even if the court adopts the plaintiff's version of the facts with respect to the time period, it cannot agree with her argument that this factor alone establishes the requisite causal connection between her protected activity and the adverse employment decision. The corollary to the Fifth Circuit rule regarding close timing between the protected activity and the adverse employment action is that once the defendant offers a legitimate, nondiscriminatory reason which explains both the adverse action and the timing, the plaintiff must offer some evidence from which the jury may infer that retaliation was the

real motive. *Id.* The defendant maintains that the Cleveland facility experienced low revenues since its opening in October, 1999 and was thus forced to institute, upon instructions from its corporate headquarters, a series of measures beginning in January 2000 to reduce production and overhead costs,[3] culminating in the decision to lay off the plaintiff along with Hayes Lee on March 17, 2000. Easley, the sole decision maker with respect to the lay off, testified that he selected the plaintiff for the lay off based on his perception that her duties as environmental safety and health coordinator could more readily be delegated to other managers and his dissatisfaction with various aspects of the plaintiff's performance, including her frequent tardiness and absence from work, inadequate documentation of environmental health and safety issues, her lack of professionalism in her dealings with other employees and her tendency to overreach her authority by issuing write-ups to employees. The plaintiff expends considerable effort to show that Easley's pejorative review of her performance was erroneous. However, merely disputing Easley's assessment of the plaintiff's work will not necessarily establish a genuine issue of material fact with respect to her claim of unlawful retaliation. *See Mayberry v. Vought Aircraft Company*, 55 F.3d 1086, 1091 (5th Cir. 1995)(noting that a dispute in the evidence concerning job performance does not provide a sufficient basis for a jury question); *see also Shachkelford*, 190 F.3d at 408. The ultimate issue on summary judgment is whether the plaintiff can produce evidence which could support a finding that she would not have been fired in the absence of her having engaged in a protected activity under Title VII. *Shackelford*, 190 F.3d at 409. Because the plaintiff fails to meet this burden, the court finds that the her Title VII retaliation claim should be dismissed.

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[3] According to the defendant, in January 2000, as part of its economic cutbacks, the Cleveland facility reduced the number of vending machines produced by 35%, instituted a hiring freeze and reduced various business related expenses. In February, 2000, it implemented a four-day work week for all of its hourly production employees, but was thereafter still instructed by corporate headquarters to reduce fixed overhead expenses in late February.

C. State Claims

In addition to federal question jurisdiction, the plaintiff has alleged diversity jurisdiction and supplemental jurisdiction over the plaintiff's claims based on state law.

1. Public Policy Exception to Mississippi's "At-Will" Employment Doctrine"

Mississippi law follows the "at-will" employment doctrine. *Kelly v. Mississippi Valley Gas Co.*, 397 So.2d 874, 874 (Miss. 1981). In the absence of a formal contract of employment containing a fixed term of employment or creating some contractual expectation of tenure during satisfactory performance, an employee works at the will of his employer, and the contract of employment may be terminated at any time by either the employer or the employee without the need for explanation. *McCrory v. Wal Mart Stores, Inc*., 755 So.2d 1141 (Miss.App. 1999). The at-will employment doctrine is, however, not absolute. Under two narrow public policy exceptions, an employee may not be fired for: 1) refusing to participate in an illegal activity; or 2) reporting the illegal acts of the employer. *McArn v. Allied Bruce-Terminix Co.*, 626 So.2d 603, 607 (Miss. 1993). The plaintiff, an at-will employee, brings a claim of wrongful discharge under the exception that prohibits discharge for a refusal to participate in an illegal act. The relevant facts stem from an OSHA report which the plaintiff had filled out after investigating an on-site injury involving an employee in the paint department and a defective paint gun. As mentioned in the factual summary herein, the plaintiff's OSHA report stated, *inter alia*, that the paint gun was defective, that Amos Rogers had ignored the employee's call to turn off the paint line and, consequently, that the employee inhaled fumes from the sprawling paint. The plaintiff alleges that Gorman, upon Easley's mandate, instructed her to discard the original OSHA report and to draft a new one, omitting any indication that the employee actually inhaled paint fumes and that Rogers had failed to assist the employee. It is undisputed that the plaintiff refused to make any changes to the original OSHA report, and the plaintiff alleges that she was discharged for her refusal to do so.

The defendant maintains that the plaintiff was never asked to discard the original report, but merely to add "[the employee] said" in front of the parts of the report at issue in the instant cause in order to indicate that the allegations therein were not substantiated facts. However, in its rebuttal brief,

the defendant concedes "that sufficient genuine issues of material fact exist" with respect to the plaintiff's claim, but argues that summary judgment is still appropriate based on legal grounds alone. Relying on *Rosamond v. Pennaco Hosiery, Inc.* 942 F.Supp 279 (N.D. Miss. 1996), the defendant contends that if existing law already affords a remedy that adequately protects the plaintiff's interest and the public policy at issue, the plaintiff cannot bring a suit pursuant to the public policy exception to the "at-will" employment rule since such a suit would be redundant. According to the defendant, such a "parallel" remedy exists under the Occupational Safety and Health Act, 29 U.S.C. §§ 651-700, which provides *inter alia* civil and criminal penalties for making false statements on OSHA reports and relief procedures for any employee discharged for exercising her rights under the Act. *See* 29 U.S.C. § 660(g); 29 U.S.C. § 660(c).

The defendant's reliance on *Rosamond* and the relief provisions of OSHA is misplaced. In *Rosamond*, the employer's alleged illegal act involved a violation of the Americans with Disabilities Act, a civil illegality. The plaintiff filed suit under both the ADA and the public policy exception to the "at-will employment" doctrine, alleging in furtherance of the latter that she was discharged for her reporting of the employer's ADA violation to the Equal Employment Opportunity Commission. The court in *Rosamond* refused to extend the public policy exception to the plaintiff because it deemed that the ADA already affords an adequate remedy and also protects the public policy at issue in that cause. *Rosamond,* 942 F.Supp. at 286. The court also held that application of the public policy exception requires the two following factors: 1) that the employer's discharge violates some well-established public policy; 2) that there be no remedy to protect the interest of the aggrieved employee or society. *Id.* at 287. It is unclear whether the court's holding in *Rosamond* applies to criminal violations, which is the type of illegality at issue in the instant cause. However, the court does not need to address this particular issue because, even assuming *arguendo* that *Rosamond* is applicable to the instant cause, the defendant's argument that OSHA affords the plaintiff an adequate remedy misconstrues the relevant relief provisions of OSHA. The particular provision on which the defendant relies provides that no employee shall be discharged for instituting any procedure or otherwise exercising any right pursuant to

OSHA. *See* U.S.C. 660(c)(1). However, the provision also states:

> Any employee who believes that he has been discharged . . . by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary [of OSHA] alleging such discrimination. Upon receipt of such complaint, *the Secretary shall cause* such investigation *as he deems appropriate. If upon such investigation, the Secretary determines* that the provisions of this subsection have been violated, *he shall bring an action* in any appropriate United States district court against such person.

29 U.S.C. § 660(c)(2)(emphasis added). In other words, the decision to sue under the said provision is completely discretionary on the part of the OSHA Secretary. Even if the Secretary decides to pursue the employee's complaint, the employee is not involved in any way with the proceedings and has no authority over the course and manner in which she may pursue her cause. It can hardly be said, then, that OSHA affords the plaintiff in the instant cause the kind of remedy, discussed in *Rosamond*, that obviates the need for the plaintiff to bring suit under the public policy exception to the at-will employment doctrine. Accordingly, based on the defendant's concession of genuine issues of material fact with respect to the public policy exception and misplaced reliance on *Rosamond*, the court finds that it is not entitled to summary judgment on this claim.

2. Wrongful Discharge in Violation of Contractual Obligation Created by Employee Handbook

Mississippi law provides that an employee handbook can create contractual obligations on the part of the employer, even in the absence of a written agreement. *Perry v. Sears, Roebruck & Co.*. 508 So.2d 1086, 1088 (Miss. 1987). If a personnel manual is distributed to all employees, the employer must follow the obligations set forth therein and may not disregard them merely because the employee is "at-will." *Bobbitt v. The Orchard, Ltd.*, 603 So.2d 356 (Miss. 1992). The plaintiff contends that the defendant's sex discrimination policy outlined in the employee handbook was contractual in nature and that the defendant breached its obligations under the relevant provisions by discriminating against her. The plaintiff's argument is without merit. The court is unaware of a single case which supports the plaintiff's breach of contract theory based on the anti-discrimination provisions

of the employee handbook. In any event, as aforementioned in the court's discussion of disparate treatment, the plaintiff fails to establish a genuine issue of material fact showing that she was discriminated because of her gender. Accordingly, the court finds that the plaintiff's claim should be dismissed.

III. CONCLUSION

For the foregoing reasons, the court finds that the defendant's motion for summary judgment as to the plaintiff's claim of Title VII disparate treatment, Title VII retaliation and wrongful discharge in violation of contractual obligation created by the employee handbook should be granted. That leaves the plaintiff's state law claim of wrongful discharge in violation of the public policy exception to the at-will employment doctrine remaining. The plaintiff has alleged not only supplemental jurisdiction of this state law claim but also the unusual allegation of diversity jurisdiction of a state exception to the at-will employment doctrine. Ordinarily, the court would dismiss the state law claim brought under supplemental jurisdiction since all of the federal question claims are being disposed of by summary judgment; however, the plaintiff having pled diversity jurisdiction of this state law claim, the court cannot thereby dismiss the claim without prejudice as it would ordinarily do if it were only a claim under supplemental jurisdiction. The status of the case at this point is the unusual claim of an in-state plaintiff claiming diversity jurisdiction against an out-of-state defendant, a situation standing the theory behind diversity jurisdiction on its ear. The diversity jurisdiction claim has not been adequately pled in the complaint of this case. If the plaintiff wishes to continue this one charge in federal court, it will have thirty (30) days from the date hereof to properly plead diversity jurisdiction as required by the case law of this circuit. Otherwise, that claim will be dismissed without prejudice. An order will issue accordingly.

THIS, the _____ day of February, 2002

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NEAL B. BIGGERS, JR.

SENIOR U.S. DISTRICT JUDGE